In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 966

WILBERT CHARLES SCHULTZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Pet. App. 22-23) has not yet been reported. The opinion of the District Court (R. 4-13) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 28, 1957 (Pet. App. 24). A petition for rehearing was denied April 15, 1957 (Pet. App. 25). The petition for a writ of certiorari was filed May 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Although not denying that there was basis in fact for denial of his claim to ministerial exemption under the Universal Military Training and Service Act, petitioner challenges his ultimate I-O (conscientious objector) classification for alleged procedural errors. In this posture he presents the following questions:

1. Whether the local board proceeded on an erroneous theory that in order to qualify as an ordained minister a person must have had formal training.

2. Whether, after the local board on its own initiative sought current information on petitioner's status, it was required to give him formal notice that it did not deem that the new information required a change of classification.

STATUTES AND REGULATIONS INVOLVED

Section 16(g) of the Universal Military Training and Service Act (50 U.S.C. App. 466(g)) provides:

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

The pertinent Selective Service Regulations (32 C.F.R.) provide:

§ *1622.43.* In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

§ *1625.1*

* * * * *

(c). The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

§ *1625.4.* When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted

does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit (R. 64) affirming the judgment of the District Court for the Northern District of New York (R. 3-4) in which the District Court, upon trial without a jury, found petitioner guilty of failure and refusal to report for civilian work as a conscientious objector, in violation of Section 12 of the Universal Military Training and Service Act. Petitioner was sentenced to imprisonment for eighteen months (R. 4).

The record may be summarized as follows:

Petitioner was born on December 3, 1932 (R. 27). In his classification questionnaire, filed with the selective service board on February 11, 1952 (R. 25), he claimed to be both a regular minister of Jehovah's Witnesses and a student preparing for the ministry (R. 26). He stated that his occupation had been that of a carpenter (R. 27), and that his education included one year of high school, without graduation (R. 27). Upon his filing the special form for conscientious objectors, his classification was changed on February 29, 1952, from I-A to I-O (R. 29, 32-37).

In the special form, petitioner designated one Clyde Benson as the "pastor or leader" of his congregation (R. 36), but stated, "I preach from house to house. I attend the Theocratic Ministry school. If I am to do such civilian work as the board deem appropriate how am I going to preach of the kingdom of God" (R. 36).

On February 23, 1952, prior to the I-O classification, petitioner filed an appeal for classification IV-D as "a regular minister" (R. 37), in which he stated, *inter alia,* that his sect's "method of teaching and preaching" is "publicly and from house to house" (R. 38), and that he was "enrolled as a student under the direction of the Watchtower Bible & Tract Society and pursuing a full-time course of instruction and regularily [sic] engaging in the preaching work carried out by said Society, as a regular minister of religion" (R. 39). He did not set forth the time devoted to the claimed ministerial activities.

On March 13, 1952, after the I-O classification, petitioner filed a second appeal for classification IV-D as a "regular minister", in which he cited selective service regulations, and further described his training in the customary manner of Jehovah's Witnesses (R. 41). Petitioner attached an affidavit of the Company Servant and the Assistant Company Servant of the Wellsville Company, stating that petitioner was a "member" and had been "associating" for nearly a year, during which time he had been studying "to become a 'duly ordained minister' "; that for the past three months he had been "enrolled in the Theotratic [sic] Ministry School * * * that provides one the nessary [sic] preparation to become a 'duly ordained minister' "; that petitioner "has a very nice record as of preaching from house to house and on the street a work that is necessary to be classified as one of Jehovah's Witnesses" (R. 42-43).

The local board referred the appeal to the district Appeal Board on March 13, 1952. The Appeal Board, on July 31, 1952, classified petitioner I-O (R. 29).

On November 24, 1952, petitioner filed an appeal with the local board as a "duly ordained" minister, also stating that he had not had a personal appearance before the local board. The supporting certificate continued to designate Benson as Company Servant and one Weimer as Assistant Company Servant (R. 43-44). The clerk of the local board replied by letter (R. 45):

> * * * You appealed this classification on March 12, 1952 and your file was forwarded to the Appeal Board for this section. At that time you appealed for a classification of 4-D but the Appeal Board came back with a decision of 1-O by a vote of 3 to 0. The Appeal Board is over the Local Board and there is no further appeal provided by the Selective Service System.
>
> You have the right to appear before the Board at any time and if you desire I will give you an appointment for December 5th. However this Board can give you no appeal since your case has already been taken out of this Board's hands and into the Appeal Board.
>
> We are enclosing herewith papers which must be complied with within 10 days.

The papers referred to were Forms 152, LO 16-17, regarding three types of civilian work offered to petitioner as a conscientious objector. He informed the board that he would not designate any work, as he would not work for any government (R. 30, 45-46).

The board's summary of petitioner's personal interview on December 5, 1952, as prepared by a member of the board, recited (R. 47):

Information in cover sheet registrant feels local board overlooked or failed to give sufficient weight: Claims to be a member of Jehovah's Witness and is therefore an ordained minister although he has no educational training by an approved institute of learning. Objects to serving the U. S. Government in any manner.

At the trial, petitioner testified that, at the interview, the chairman of the board had informed him that the local board could not "go over the head of the Appeal Board; they could not re-open so they could not reclassify [him] no matter what evidence [he] might bring forth" (R. 15, 20), and that the chairman had said that the "certificate of ordination" was not from a "theological seminary" (R. 16, 19).

The clerk of the board testified that the regulation concerning ministerial classification was read to petitioner at the time of his interview in which, she said, it was stated that in order to obtain a IV-D classification it was necessary to be a graduate or student of a theological seminary (R. 22-23).[1] The clerk also testified that there was discussion of the "amount of time put in as a ministerial worker in comparison with the time [petitioner] was working outside" (R. 23).

In April, 1954, the board requested current information from petitioner concerning his secular and religious activities and conscientious objection (R. 52-53). Petitioner replied that he had worked 40 hours per week at Bausch & Lomb until the preceding October; that he was now working 24 hours per week as a car-

[1] The regulation (*supra*, p. 3-4) actually makes this a requirement for a IV-D classification as a ministerial student.

penter's helper for his father in return for room and board; that his income the past 12 months had been $1,540.73; that 45 persons were associated with the Wellsville congregation; that there were 41 "ministers actively preaching the Good News"; that petitioner was a "Publisher", "Stock Servant" and "Asst. Book Study Conductor"; that his average hours of claimed ministerial duties were 56 hours per month, of which "[p]reaching and distributing literature from house to house" were 38 hours, duties as stock servant 10 hours, "substituting for The Study Conductor" 3 hours, and the rest of the time apparently devoted to calling back on 23 people, two home "Bible Studies" and one 45 minute "Bible talk" (R. 53-54). The board found no basis for a new classification in petitioner's current information (R. 31, 56-57).

On May 10, 1954, petitioner was notified to report for hospital work at Marcy, New York (R. 57-58). Petitioner failed to appear (R. 60). On June 3, 1954, he was indicted for failure and refusal to report for the civilian work (R. 3).

The trial judge, in his memorandum-decision, preliminarily pointed out that there was no dispute as to the basis in fact for the board's classification, but only a question as to whether there had been error in procedure (R. 8). He reviewed the testimony concerning petitioner's personal interview with the board, and concluded (R. 12-13):

> Although defendant asserts in his direct examination that he was advised by the chairman that he was not entitled to a minister's rating, unless he was a graduate of a theological seminary, his own testimony on examination by the court in-

dicates that such was the witness's conclusion rather than the direct assertion of the chairman. * * *

* * * [T]he board did not act upon the assumption that a graduation certificate was the sole standard on which a IV-D classification as a minister could be based. To conclude otherwise would make the board's inquiry as to defendant's secular work as testified to by the clerk without either meaning or purpose.

ARGUMENT

Petitioner admits (Pet. 20) that there is basis in fact for denial of his claim to exemption as a minister. His own documents disclosed that he was not the leader, or assistant spiritual leader, of his congregation, that he had not even reached the 100-hour-per-month "pioneer" status, and that he did not devote sufficient time to his claimed ministerial or student work to meet the standards of *Dickinson* v. *United States,* 346 U. S. 389. He nevertheless claims that procedural errors in the method by which this proper result was reached invalidate his classification as a conscientious objector and justify his refusal to report for work of national importance. His claims in this respect are not supported by the record.[2]

1. Petitioner's chief argument is based on an assumption, which the district court specifically found not supported, that the local board denied his claim to ministerial status on the ground that he was not a grad-

[2] Petitioner does not press here the issue he urged below with respect to the local board's alleged refusal to reconsider his classification on the ground that it was bound by a prior decision of the Appeal Board (Pet. 2).

uate of a theological seminary. The trial judge found that the local board had not classified petitioner on the basis of such an erroneous theory as to the applicable law.

Petitioner had originally applied for exemption as a "regular minister of religion," defined in the statute, *supra,* p. 3, as one "who as his customary vocation preaches and teaches the principles of religion of a church * * *." Admittedly he failed to substantiate that claim. Only after the denial of his claim for exemption on that ground both by the local board, and the appeal board, did petitioner assert as new evidence that he was an "ordained", as distinguished from a "regular" minister of religion. In this respect the local board explored not only his education, which was certainly relevant, but also the number of hours devoted to secular and religious activities. The board also showed its understanding that the relationship between ministerial and secular activities was important by its questions addressed to petitioner in 1954 (R. 52-53).

In view of the finding by the trial court that the local board did not make its decision on the theory that formal education was essential for the exemption, no conflict exists between this case and *Niznik* v. *United States,* 184 F. 2d 972 (C.A. 6), or *Pate* v. *United States,* decided March 27, 1957 (C.A. 5) and the other cases alleged by the petitioner to be in conflict (Pet. 12-13) in which the courts found errors of law by the local boards. The only issue is whether the law was properly applied to the facts. In view of the concurrent findings of the lower courts, there is no occasion for further review here.

2. Petitioner raised below, and raises as a question here, the issue as to whether he was denied due process

in that the local board, in 1954, after requesting current information as to his ministry, did not formally notify him that it was not changing his classification. As the district court held, however, (R. 8-9), the board in 1954 was acting pursuant to Regulation 1625.1(c), *supra* p. 4, in keeping itself currently informed. Under such circumstances, there is no requirement for notice by the board when no change in classification is found warranted. Notice is required under 1625.4, *supra* pp. 4-5, only where there has been a request to reopen by an interested party. Petitioner made no such request in 1954.

Moreover, petitioner was notified, on May 10, 1954, within a week of the board's review of the current information, that he was to report—as a conscientious objector—for civilian service in lieu of service in the armed forces. This was certainly notice to him that his classification had not been changed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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